



1 On July 1, 2011, the Court granted Petitioner's request for an  
2 extension of time to respond to the June 3 Order. On July 20, 2011,  
3 Petitioner filed his Response to the July 3 Order. In his Response,  
4 Petitioner asked the Court to dismiss Grounds Two through Five of the  
5 Petition without prejudice and to invoke the *Kelly* stay procedure.<sup>1</sup>

6  
7 On July 25, 2011, the Court issued an Order that granted  
8 Petitioner's request ("July 25 Order"). In the July 25 Order, the  
9 Court concluded that a *Rhines* stay<sup>2</sup> would not be appropriate in this  
10 action, because there was no good cause for Petitioner's failure to  
11 exhaust Grounds Two through Five before seeking federal habeas relief.  
12 The Court: granted Petitioner's request to voluntarily dismiss  
13 Grounds Two through Five of the Petition without prejudice; ordered  
14 the Petition amended to delete these four dismissed claims; stayed  
15 this action, pursuant to the *Kelly* stay procedure, for the purpose of  
16 allowing Petitioner to exhaust Grounds Two through Five through the  
17 filing of a habeas petition in the California Supreme Court;  
18 established deadlines by which Petitioner was required to file status  
19 reports; and directed that, should the California Supreme Court deny  
20 habeas relief, Petitioner must file a motion to lift the stay of this  
21 action and request leave to amend the Petition to re-plead Grounds Two  
22 through Five. Thereafter, Petitioner filed a copy of his state high  
23 court habeas petition and timely status reports.

24  
25  
26 <sup>1</sup> See, e.g., King v. Ryan, 564 F.3d 1133 (9th Cir. 2009)  
27 (describing *Kelly* stay procedure available to habeas litigants in the  
Ninth Circuit).

28 <sup>2</sup> See Rhines v. Weber, 544 U.S. 269, 125 S. Ct. 1528 (2005).

1 On February 13, 2012, Petitioner notified the Court that the  
2 California Supreme Court denied habeas relief on January 18, 2012  
3 (Case No. S195015), and he moved to: lift the stay of this action  
4 imposed on July 25, 2011; and for leave to amend to re-plead Grounds  
5 Two through Five in the existing Petition. On February 15, 2012, the  
6 Court granted the motion, lifted the stay of this action, and ordered  
7 the Petition served on counsel for Respondent.

8  
9 On June 28, 2012, Respondent filed a motion to dismiss the  
10 Petition based on the grounds that: (1) the Petition remains "mixed,"  
11 because Ground Five is unexhausted; and (2) Grounds Two and Four are  
12 not cognizable ("Motion"). With the Motion, Respondent lodged the  
13 relevant portions of the state record ("Lodg.").

14  
15 The Court has reviewed the Petition, the Motion, and the state  
16 record. It appears to the Court that both grounds raised in the  
17 Motion have merit and that dismissal of this action in whole or in  
18 part is warranted, based on the following reasons.

19  
20 I. Ground Two And Four Are Not Cognizable

21  
22 Ground Two of the Petition asserts that a search and seizure that  
23 led to Petitioner's arrest was "illegal," because the police officer  
24 lacked probable cause. (Petition at 5.) Ground Four of the Petition  
25 asserts that the search warrant lacked probable cause, because it was  
26 based on the affiant's opinion. (Petition at 6.) Liberally  
27 construed, both claims assert that Petitioner's Fourth Amendment  
28 rights were violated by the search that preceded his conviction.

1 "[W]here the State has provided an opportunity for full and fair  
2 litigation of a Fourth Amendment claim, a state prisoner may not be  
3 granted federal habeas corpus relief on the ground that evidence  
4 obtained in an unconstitutional search or seizure was introduced at  
5 his trial." Stone v. Powell, 428 U.S. 465, 494, 96 S. Ct. 3037, 3052  
6 (1975). Under Stone, "[a] Fourth Amendment claim is not cognizable  
7 in federal habeas proceedings if a petitioner has had a full and fair  
8 opportunity to litigate the claim in state court." Ortiz-Sandoval v.  
9 Gomez, 81 F.3d 891, 899 (9th Cir. 1996); see also Moormann v. Schriro,  
10 426 F.3d 1044, 1053 (9th Cir. 2005); Villafuerte v. Stewart, 111 F.3d  
11 616, 627 (9th Cir. 1997).

12  
13 A petitioner may receive federal habeas consideration of a Fourth  
14 Amendment claim only if he demonstrates that the state courts did not  
15 provide him with a full and fair hearing with respect to the claim.  
16 See Woolery v. Arave, 8 F.3d 1325, 1327-28 (9th Cir. 1993). In  
17 determining whether a habeas petitioner has had a full and fair  
18 opportunity to litigate his Fourth Amendment claim in state court,  
19 "[t]he relevant inquiry is whether petitioner had the *opportunity* to  
20 litigate his claim, not whether he did in fact do so or even whether  
21 the claim was correctly decided." Ortiz-Sandoval, 81 F.3d at 899  
22 (emphasis added); see also Gordon v. Duran, 895 F.2d 610, 613 (9th  
23 Cir. 1990)(as long as the petitioner "had an opportunity in state  
24 court for 'full and fair litigation' of his fourth amendment claim,"  
25 habeas relief is foreclosed on his claim that an unconstitutional  
26 search and seizure occurred). California provides criminal defendants  
27 with a full and fair opportunity to litigate their Fourth Amendment  
28 claims through the California Penal Code § 1538.5 remedy, which

1 establishes a specific mechanism by which defendants may seek the  
2 suppression of evidence on the ground that it was obtained through  
3 unconstitutional means. See *id.*; see also Locks v. Summer, 703 F.2d  
4 403, 408 (9th Cir. 1983).

5  
6 The state record shows that Petitioner moved to unseal and quash  
7 the search warrant that is the subject of Grounds Two and Four, and  
8 his motion was denied. (Lodg. No. 1 at 105-11, 162.)<sup>3</sup> Petitioner,  
9 thus, availed himself of the mechanism provided to him by California  
10 law. Petitioner's utilization of the Section 1538.5 remedy provided  
11 him with a full and fair opportunity to litigate his Fourth Amendment  
12 claims; the fact that he did not prevail when he exercised that remedy  
13 is irrelevant. See Ortiz-Sandoval, 81 F.3d at 899 (a finding that a  
14 petitioner had a "full and fair opportunity" to litigate his claims  
15 does not depend on whether his claims were correctly decided by the  
16 state courts).

17  
18 Thus, pursuant to the Stone doctrine, Grounds Two and Four of the  
19 Petition are not cognizable and are barred from federal habeas review.

20  
21 II. Ground Five Is Unexhausted.

22  
23 Ground Five of the Petition asserts that Petitioner was  
24 "wrongfully convicted" of a gang enhancement found true by the jury,  
25 because the prosecutor's arguments in support of the enhancement were

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26  
27 <sup>3</sup> Petitioner moved to quash the warrant pursuant to People v.  
28 Hobbs, 7 Cal. 4th 948 (1994). (Lodg. No. 1 at 109.) Hobbs stemmed  
from an unsuccessful motion to quash a search warrant pursuant to  
California Penal Code § 1538.5. See *id.* at 955.

1 based on "stale and baseless information" that was prejudicial.  
2 (Petition at 6.) Liberally construed, Ground Five appears to assert  
3 a due process claim, *i.e.*, that the prosecutor advanced a false and/or  
4 improper argument to secure a true finding on the gang enhancement.  
5 No such claim, however, has been presented to the California Supreme  
6 Court.

7  
8 In his petition for review, Petitioner asserted *only* the claim  
9 now alleged as Ground One in the Petition. (Lodg. No. 2.) Ground One  
10 of the Petition does allege prosecutorial misconduct during closing  
11 argument; however, the claim rests only on the prosecutor's argument  
12 related to the substantive offense of which Petitioner was convicted.  
13 Specifically, Petitioner argued that the prosecutor improperly  
14 proffered her personal opinion that Petitioner was a drug dealer based  
15 on his use of the word "keys." (See Lodg. No. 2, *passim*.) The  
16 petition for review did not raise the claim now alleged in Ground  
17 Five.

18  
19 In his habeas petition filed with the California Supreme Court,  
20 Petitioner raised three grounds for relief. Ground One of the state  
21 habeas petition raised the claim now asserted as Ground Three of the  
22 instant Petition. Ground Two of the state habeas petition raised a  
23 claim not alleged in the instant Petition. Ground Three of the state  
24 habeas petition raised a Fourth Amendment claim that appears to  
25 encompass the same claims intended to be asserted through Grounds Two  
26 and Four of the instant Petition. The state habeas petition did not  
27  
28

1 allege the claim now alleged as Ground Five in the instant Petition.<sup>4</sup>  
 2 (See Lodg. No. 10. *passim*.) Thus, Ground Five remains unexhausted,  
 3 and the Petition remains "mixed."

4  
 5 The Court has already stayed this action once so that Petitioner  
 6 could exhaust Ground Five. His failure to do so is inexcusable.  
 7 Accordingly, there is no legitimate basis for staying this action a  
 8 second time.

9  
 10 III. Dismissal Of The Petition, In Whole Or In Part, Appears To  
 11 Be Required.

12  
 13 With respect to the Court's conclusion in Section I that Grounds  
 14 Two and Four of the Petition are not cognizable, Petitioner is ORDERED  
 15 TO SHOW CAUSE why these two claims should not be dismissed. **By no**  
 16 **later than August 24, 2012**, Petitioner shall file a Response to this  
 17 Order To Show Cause in which he advises clearly whether he: (1)

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18  
 19 <sup>4</sup> Respondent observes that Ground Five alleges that the  
 20 prosecutor relied on "stale and baseless information" in support of  
 21 the gang enhancement, and in the Fourth Amendment claim alleged in the  
 22 state petition, Petitioner complained that the search warrant also was  
 23 predicated on "stale information." (See Lodg. No. 10 at 4cc, 4jj-  
 24 4kk.) A claim that the search warrant was invalid because it rested  
 25 on stale information is entirely different -- both factually and  
 26 legally -- from a claim that the prosecutor committed misconduct at  
 27 trial by arguing stale information. The exhaustion of the former  
 28 claim did not exhaust the latter claim. See Rose v. Palmateer, 395  
 F.3d 1108, 1112 (9th Cir. 2005) (holding that a Fifth Amendment claim  
 was related to a Sixth Amendment ineffective assistance of appellate  
 counsel claim only insofar as the Sixth Amendment claim was premised  
 on counsel's failure to raise the substance of the Fifth Amendment  
 claim on state appeal, because "they are distinct claims with separate  
 elements of proof, and each claim should have been separately and  
 specifically presented to the state courts"; thus, even though the  
 Sixth Amendment claim was exhausted, a claim based on the underlying  
 Fifth Amendment violation was not).

1 concedes that Grounds Two and Four are not cognizable and agrees that  
2 the two claims should be dismissed; or (2) contends that Grounds Two  
3 and Four are cognizable. If Petitioner contends that Grounds Two and  
4 Four are cognizable, then he must explain, in his Response, why these  
5 two claims may be considered on their merits.

6  
7 With respect to the Court's conclusion in Section II that Ground  
8 Five of the Petition is unexhausted, **by no later than August 24, 2012**,  
9 Petitioner shall file a Response to this Order To Show Cause in which  
10 he advises clearly whether he: (1) concedes that Ground Five is  
11 unexhausted; or (2) contends that Ground Five was exhausted through  
12 his California Supreme Court habeas petition. If Petitioner contends  
13 that Ground Five is exhausted, then he must explain, in his Response,  
14 how the claim was fairly presented in his California Supreme Court  
15 habeas petition. If Petitioner concedes that Ground Five is  
16 unexhausted, in his Response, he must clearly select one of the  
17 following two options: (1) Petitioner may voluntarily dismiss Ground  
18 Five; or (2) Petitioner may voluntarily dismiss the Petition as a  
19 whole, and thus, this action will be dismissed without prejudice.

20  
21 **Petitioner is cautioned that a failure to timely**  
22 **respond to this Order To Show Cause will be deemed to**  
23 **constitute a concession that: Grounds Two and Four are not**  
24 **cognizable; and Ground Five is unexhausted. Moreover, if**  
25 **Petitioner fails to timely respond to this Order To Show**  
26 **Cause, the Petition will remain "mixed," and thus, the**  
27 **dismissal of this action, without prejudice, will be**  
28 **required.**



